INDEX.

	Page
Statement	1–2
Argument	2–22
POINTS OF THE ARGUMENT:	
I. The petitioner herein, as respondent below, voluntarily submitted to the jurisdiction of the District Court, filed an answer in which it admitted all of the necessary jurisdictional facts and thereby waived any right to object to the jurisdiction of that Court	2–8
II. The Government's delay in raising the jurisdictional objection and the manner in which it has been raised and urged has imposed an unconscionable burden and great expense upon the respondent and upon the Courts	9–15
III. The respondent herein, as petitioner and appellee below has alleged and proved to the satisfaction of all of the Courts below both on hearing and rehearing that this is a suit timely brought upon the rejection of a proper claim for refund of the $34,555.68 as a 1917 tax	15–18
IV. The decision of the Circuit Court of Appeals is not in conflict with any of the decisions of this Court or those of any other Circuit Court of Appeals and the cases relied upon by the Government are clearly inapplicable	19–22
Conclusion	22–23

STATUTES CITED.

	Page
Section 250 (d) of the Revenue Act of 1921; 42 Stat. 265	2
Section 24 (20) of the Judicial Code, as amended, 28 U. S. C. 41 (20)	2
Section 24 (5) of the Judicial Code, as amended, 28 U. S. C. 41 (5)	4
Act of March 3, 1887, c. 359, p. 6; 24 Stat. 506	4
Section 3226 of the United States Revised Statutes	17

CASES CITED.

Guaranty Trust Company of New York v. United States, 304 U. S. —; 58 S. Ct. 785, 789	7
Howbert, Collector v. Penrose, 38 F. (2) 577, 581	6
Leather Manufacturers Nat. Bank v. Morgan, 117 U. S. 96; 6 S. Ct. 657, 662	14
Primos Chemical Company v. Fulton Steel Corporation (D. C. N. D. N. Y.) 254 Fed. 454, 458	5

CASES DISTINGUISHED.

Lowe Brothers Company v. United States, 304 U. S. 302; 58 S. Ct. 896, 898	8, 10, 19, 20
Moses v. United States (C. C. A. (2)) 61 F. (2) 791, certiorari denied 289 U. S. 743	10, 19
Routzahn v. Reeves Brothers, 59 F. (2) 915 (C. C. A. 6th), certiorari denied, 287 U. S. 650	10
United States v. Andrews, 302 U. S. 517	21
United States v. Garbutt Oil Company, 302 U. S. 528	21
United States v. Reeves Brothers, 83 F. (2) 121 (C. C. A.) 6th), certiorari denied, 299 U. S. 573	10
Williamsport Wire Rope Company v. United States, 277 U. S. 551; 48 S. Ct. 589	11, 20, 21

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 416.

UNITED STATES OF AMERICA, PETITIONER,
v.
BERTELSEN & PETERSEN ENGINEERING COMPANY.

BRIEF FOR THE RESPONDENT

IN OPPOSITION TO THE ALLOWANCE OF A WRIT OF CERTIORARI.

STATEMENT.

The United States, as petitioner herein, prays for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the First Circuit (R. Vol. I, pp. 75–79) entered on July 13, 1938, which affirmed a judgment (R. Vol. II, pp. 16–23), rendered by the United States District Court for the District of Massachusetts in favor of the respondent herein, petitioner appellee below. The amount of the judgment is $34,555.68 together with the statutory interest thereon; the decision of the Circuit Court of Appeals is reported in 98 F. (2d) 182; and that of the District Court in 14 F. Supp. 868.

The $34,555.68 represents a portion of an overpayment of the respondent's income, excess-profits and war-profit taxes for the taxable year 1917 which the Commissioner of Internal Revenue refused to refund, but wrongfully and illegally credited against an alleged deficiency of taxes for the year

1918. The credit was made (1) without any assessment and notice of the alleged tax liability for the year 1918 and (2) after the five year period of limitation for the assessment and collection of any such taxes for the year 1918, as extended by various waivers, had expired under the provisions of *Section* 250 (d) *of the Revenue Act of* 1921; 42 Stat. 265.

The suit was brought in the District Court under *Section* 24 (20) *of the Judicial Code, as amended,* 28 U. S. C. 41 (20), usually referred to as the "Tucker Act". The sum in controversy "exceeds $10,000.00" and the Collector of Internal Revenue to whom the 1917 taxes were paid was "not in office" at the time the suit was commenced.

The petition for a writ of certiorari is based solely on the ground (1) that the District Court did not have jurisdiction of the case under the Tucker Act, as amended, and (2) that the Circuit Court of Appeals erred in refusing to order dismissal of the suit on that ground.

The respondent herein respectively submits the following in opposition to the allowance of the petition for the writ of certiorari.

ARGUMENT.

Point I.

THE PETITIONER HEREIN, AS RESPONDENT BELOW, VOLUNTARILY SUBMITTED TO THE JURISDICTION OF THE DISTRICT COURT, FILED AN ANSWER IN WHICH IT ADMITTED ALL OF THE NECESSARY JURISDICTIONAL FACTS AND THEREBY WAIVED ANY RIGHT TO OBJECT TO THE JURISDICTION OF THAT COURT.

The "statement" in the petition for the writ of certiorari (pp. 2, 3) which purports to set forth the facts material to the question of jurisdiction as alleged in the original petition and admitted by the answer is grossly inaccurate, incomplete and misleading. The original petition specifically alleges (1) that the District Court did have jurisdiction of the case (2) that proper claims for refund had been filed and

rejected and (3) that all other jurisdictional action requisite to the suit had been duly taken. The Government's answer expressly admits all of these allegations.

The original petition in the District Court (R. Vol. I, pp. 1-3) contains the following jurisdictional averments:

> "Third. This action is brought against the United States of America in the United States District Court for the District of Massachusetts, *said Court having jurisdiction of the matters herein complained of by the petitioner.* (Italics supplied.)
>
> "Fourth. The said action is one to recover back Federal war profits taxes, excess-profits taxes and income taxes plus interest for the taxable periods ended December 31, 1917, or December 31, 1918, as the case may be, both years being sued jointly; which the taxpayer alleges were erroneously and illegally collected from the said petitioner and is an action arising out of the laws of the United States providing for internal revenue.
>
> "Fifth. All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, and the claims for refund as to the matters herein complained of have been denied or rejected by the Commissioner of Internal Revenue.
>
> . . . . . .
>
> "Eighth. Wherefore the petitioner claims a refund of $34,555.68 for 1918, representing an amount within less than four years which has been taken out of the 1917 proposed refund and employed to pay the 1918 deficiency without having been assessed, hence claiming same as refund now for 1918 illegally paid, or requesting the said same amount for 1917 as never having been fully paid after allowance. The taxpayer claims further interest from June 1918 to date of allowance by this

Honorable Court on the said $34,555.68, approximating $22,000."

The government's answer (R. Vol. I, p. 3) was as follows:

"Comes now the respondent in the above-entitled action and for answer to the petition filed herein admits each and every allegation in paragraphs First to Eighth, inclusive, of the said petition, except any allegation or suggestion or implication in said paragraphs, or any of them, that the assessment of $34,555.68 for 1918 was not assessed or was assessed at any other time than in July, 1926. . . ."

It is fundamental that any suitor can submit himself to the jurisdiction of any Court which has jurisdiction over the subject matter of the suit. In the case at bar, it is clear that under the statute the District Court did have jurisdiction of the subject matter because this is a case arising under the laws providing for Internal Revenue. *Section 24 (5) of the Judicial Code, as amended,* 28 U. S. C. 41 (5) provides that the District Court shall have jurisdiction as follows:

"Fifth. Of all cases *arising under any law providing for internal revenue,* or from revenue from imports or tonnage except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (R. S. No. 563, par. 5, No. 629, par. 4; Mar. 3, 1911, c. 231, No. 24, par. 5, 36 Stat. 1092.)" (Italics supplied.)

Moreover the statute itself, Act of March 3, 1887, c. 359, page 6; 24 Stat. 506, authorizes and directs the Attorney General of the United States and the District Attorney upon whom a petition of this kind is filed to represent the Government and to file all of the necessary pleadings. The Statute provides:

"763. *Same; service; appearance by district attorney.* . . . It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. Should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court."

Since the original petition in this case was filed and served in accordance with the requirements of the statute and the duly authorized officers of the Government have not only expressly admitted that the District Court did have jurisdiction of the case but have also admitted all of the necessary jurisdictional facts, we respectfully submit to this Honorable Court that the United States should be bound by those admissions just as any other defendant would be bound if he consented to the jurisdiction of any Court which is invested with jurisdiction over the subject matter.

In the case of *Primos Chemical Company* v. *Fulton Steel Corporation* (D. C. N. D. N. Y.) 254 Fed. 454, 458, the Court said:

"Questions of jurisdiction in the United States courts are not free from perplexities. . . .

. . . . . .

"There is such a thing as jurisdiction of the person

which can be given by consent of the defendant, he waiving his right to be sued in a given district, and there is such a thing as jurisdiction of the subject-matter of the suit, which cannot be conferred on any court by either assumption of jurisdiction or by consent of the parties, or of either or any of them, or by request of all the parties to the suit. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 820; *Mansfield, etc.* v. *Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Parker* v. *Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654."

In the case of *Howbert, Collector* v. *Penrose*, 38 F. (2) 577, 581, the Government based its jurisdictional objection upon the insufficiency of the claim for refund. It failed to plead the objection by its answer and did not raise it until it was too late for the taxpayer to remedy the defect. The Circuit Court of Appeals for the Tenth Circuit overruled the objection and said:

"If the defendant had challenged the sufficiency of the claim by his answer, the plaintiff had abundant time to supply the deficiency by a new or an amended claim. When the point was first raised at the trial in October, 1928, both periods of limitation had expired.

"The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to recover this tax. The defendant concedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc., R. Co.* v. *United States*, 254 U. S. 141, 41 S. Ct. 55, 65 L. Ed. 188), *the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is the substance should be given*

the right of way over form. Eisner v. *Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 46 S. Ct. 449, 70 L. Ed. 886.

"The claim for refund should have been more particular; *but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer.* The derelictions of the parties are about equal, and if the matter is at large, *the tax ought to be repaid, for concededly the government has no right to it.*" (Italics supplied.)

In the case of *Guaranty Trust Company of New York* v. *United States*, 304 U. S.—; 58 S. Ct. 785, 789 (decided April 25, 1938) this Court held that when a foreign Government or the Government of the United States voluntarily appears in the District Court, as has been done here by the Government's answer, such government thereby abandons its sovereign immunity and cannot thereafter object on the ground that the District Court did not have jurisdiction. Mr. Justice Stone said:

"By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States* v. *The Thekla*, 266 U. S. 328, 340, 341, 45 S. Ct. 112, 113, 69 L. Ed. 313; *United States* v. *Stinson*, 197 U. S. 200, 205, 25 S. Ct. 426, 49 L. Ed. 724; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129. As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individ-

> uals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts."

In the case of *Lowe Brothers Company* v. *United States*, 304 U. S. 302; 58 S. Ct. 896, 898, on which the Government strongly relies in the case at bar, Mr. Justice Stone said:

> ". . . The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit previously allowed against the Collector whenever the amount claimed exceeds $10,000 and the Collector is out of office. This is made evident by the words of the amendment which authorize the substitution only when the collection is made by the collector when in office.

Inasmuch as a suit of this kind is a substitution for the common law or personal action against the Collector, it would seem clear that the United States can submit to the jurisdiction of the District Court just as any other ordinary litigant could submit to the jurisdiction of any Court which had jurisdiction over the subject matter.

The respondent respectfully submits to this Honorable Court, therefore (1) that the District Court did have jurisdiction, (2) that the Courts below did not err in entertaining and hearing the suit (3) that the government has by its answer waived any right to object to the jurisdiction of the District Court and (4) that the petition for the writ of certiorari should be denied on those grounds.

Point II.

THE GOVERNMENT'S DELAY IN RAISING THE JURISDICTIONAL OBJECTION AND THE MANNER IN WHICH IT HAS BEEN RAISED AND URGED HAS IMPOSED AN UNCONSCIONABLE BURDEN AND GREAT EXPENSE UPON THE RESPONDENT AND UPON THE COURTS.

The original petition in the suit was filed September 19, 1929 (R. Vol. I, p. 1) and the government's answer expressly admitting that the District Court did have jurisdiction of the case and also admitting all the necessary jurisdictional facts was filed on October 21, 1929 (R. Vol. I, p. 3). Upon these pleadings all of the evidence was submitted and the case was heard, argued and decided twice in the District Court and once in the Circuit Court of Appeals before the Government made any attempts whatsoever to disregard and repudiate the admission in its answer or to object to the jurisdiction of the District Court. It was not until February 18, 1937, when the Government filed its assignment of error at the second hearing in the Court of Appeals that any such objection was ever raised. The seventh assignment of error (R. Vol. II, p. 62) reads as follows:

> "VII. That the Court erred by assuming jurisdiction to try and determine the controversy between the plaintiff and the defendant herein."

Either purposeful or otherwise, the government's objection to the jurisdiction of the District Court was delayed or concealed throughout all of the intervening years between 1929 and 1937. Obviously the appellee was taken completely by surprise. From the very beginning the respondent, as petitioner below, was misled and deceived by the jurisdictional admissions in the government's answer which it relied upon in good faith. The objection has never been clearly stated and set forth by an amendment to the answer,

by motion or by any other form of pleading. In all of the unpleaded and dilatory attacks upon the jurisdiction of the District Court, the Government has constantly shifted its position and has attempted to impute to the respondent the bringing of first one form of action and then another while the real form of the action and the real nature of the appellee's claim as set forth in the petition are entirely disregarded and the admissions in its own answer are coldly ignored and repudiated.

When the case was argued in the Circuit Court of Appeals on the foregoing assignment of error, the objection was based solely on the ground that the respondent, petitioner below, was seeking recovery of the $34,555.68 as a "1918 tax" and that the District Court did not have jurisdiction of the case because the 1918 tax had been collected by way of the credit by the Commissioner of Internal Revenue. This contention was based upon the cases of *United States* v. *Reeves Brothers*, 83 F. (2) 121 (C. C. A. 6th) certiorari denied 299 U. S. 573 and *Routzahn* v. *Reeves Brothers*, 59 F. (2) 915 (C. C. A. 6th) certiorari denied 287 U. S. 650.

The Circuit Court of Appeals overruled that objection and held (R. Vol. II, p. 65) that in the last analysis the suit was for a balance of an overpayment of the 1917 tax and not for an illegal collection of the 1918 tax.

Counsel for the Government construed the foregoing language of the Circuit Court to mean that the case had been decided on the theory that this is an action on an account stated or that it was based on an implied promise of the Government to pay. Thus, at the rehearing the Government insisted that since the suit was based on the certificate of overassessment or the implied promise of the government the District Court did not have jurisdiction under the decisions of *Moses* v. *United States*, C. C. A. (2) 61 F. (2) 791, certiorari denied, 289 U. S. 743 and *Lowe Brothers Company* v. *United States*, 304 U. S. 302. The Circuit Court

of Appeals also overruled this objection (R. Vol. II, p. 76) and in the course of its opinion said:

> "That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. The application by the Commissioner on July 27, 1926, of a part of the overpayment for 1917 to a deficiency tax for 1918, against the protest of the taxpayer, constituted a disallowance of so much of the petitioner's original claim for refund.
>
> . . . . . .
>
> ". . . and on November 28, 1927, the taxpayer renewed its claim for a refund of $34,555.68 as an overpayment of its 1917 tax by filing with the Commissioner of Internal Revenue a specific claim for the amount under Sec. 3226 R. S. as amended by Sec. 1113 of the Revenue Act of 1926, to which claim the suit of the taxpayer relates, the receipt of which claim was acknowledged by the Commissioner.
>
> "On February 6, 1928, the Commissioner of Internal Revenue notified the taxpayer by letter that its claim of November 28, 1927, had been examined and would be rejected, which rejection would appear on the next schedule approved by the Commissioner. . . ."

In the petition for certiorari the Government is attempting to make it appear (1) that this suit is based upon the refusal of the Commissioner to grant a special assessment claim such as this Court held could not be made the basis of a suit in the case of *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551; 48 S. Ct. 589 and (2) that the claim for refund upon which the suit is based was filed out of time

and based on a different ground from the original claim for refund.

As to the first of these contentions, the petition (p. 7) states:

> ". . . A further fatal objection to the approach taken by the court below lies in the fact, overlooked by that court, that the overassessment for 1917 results from a special assessment pursuant to Sections 210 and 328 of the Revenue Acts of 1917 and 1918 (O. R. 32, 37; R. 44, 52, 57–58). No action in any court could, therefore, have been predicated upon the rejection of the original claim. *Welch* v. *Obispo Oil Co.*, 301 U. S. 190; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Williamsport Co.* v. *United States*, 277 U. S. 551. Consequently, if it be true that the 1927 claim for refund was a 'reopening' of the original claim, the essence of the 1927 claim would be for special assessment relief. . . ."

It is true that the petitioner filed an application for special assessment under Section 210 of the Act. But, it also filed timely and proper claim for refund of $121,715.09 on account of its 1917 tax. With respect to this first claim the Commissioner's letter (R. Vol. I, p. 32) states that the respondent would be entitled to a refund of $91,570.34 by the method of special assessment and with respect to the claim for refund the same letter states as follows:

> "In accordance with the above conclusions, your claims for the refund of $46,715.09 and $75,000.00, aggregating $121,715.09, will be rejected for $30,144.75."

Upon receipt of the foregoing letter of the Commissioner the respondent immediately objected to the application of the $34,555.68 which was credited against the 1918 tax and on November 28, 1927, filed two claims for refund each for $34,555.68, one for the year 1917 and the other for the year

1918 (R. Vol. I, p. 38). With respect to this claim for refund for the year 1917 and the memorandum of the Special Advisory Committee which was signed by the Commissioner of Internal Revenue and furnished to the respondent the Circuit Court makes special comment (R. Vol. II, p. 76). This memorandum stated in part as follows:

> "On November 28, 1927, the taxpayer filed with the Collector of Internal Revenue for its district claims for refund for 1917 and 1918 each for $34,555.68 on the grounds that interest had been erroneously computed and that the additional tax for 1918 had never been assessed but was used as an offset against the overassessment for 1917 after the period of limitation for making assessments as extended by waiver had expired. *The claims were considered on the merits and in Bureau letter dated February 6, 1928, they were proposed for rejection.* The official rejection appeared on schedule No. 11471 dated February 28, 1928. Within two years from the disallowance of said claims, namely, on or about August 28, 1929, a petition was filed with the United States District Court for the District of Massachusetts for the recovery of $34,555.68 and interest thereon which amount was alleged to have been erroneously and illegally withheld (this allegation applies to 1917) or erroneously and illegally collected (this allegation applies to 1918) from the petition." (Italics supplied.)

Notwithstanding all of these obvious facts which are apparent in the record and the government's admissions in its answer to the effect that proper claims for refund had been filed, the petition filed in this Court (Pet. p. 7) states as follows:

> "The claim alleged to have been filed in 1927 for the

refund of the 1917 taxes is not in the record, nor do the facts stated therein show that it was in any true sense an amendment to the original claim. Respondent, consequently even fails to show that it has complied with Section 284 (b) (1) of the Revenue Act of 1926, requiring the filing of claims within four years after the payment of the tax. Cf. *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7th); *Rock Island &c., R. R.* v. *United States,* 254 U. S. 141, 142–143."

It is obvious that all of the grounds upon which the Government bases its jurisdictional objection are matters of fact which could have been set up by way of special defenses in its answer and that fair pleading and good conscience required the Government to do so. On this aspect of the case the attention of this Honorable Court is respectfully invited to the language of Mr. Justice Harlan in the case of *Leather Manufacturers Nat. Bank* v. *Morgan,* 117 U. S. 96; 6 S. Ct. 657, 662, where in defining and invoking the doctrine of estoppel he said:

"These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth,—which he has the means, by ordinary diligence, of ascertaining,—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficient; for, as observed by the Supreme Court of *Ohio in Ellis* v. *Ohio Life Ins. & T. Co.,* 4 Ohio St. 667, while in the forum of conscience there may be a

wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard for the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty'.". . .

Notwithstanding the fact that the objection is jurisdictional in its nature, we respectfully submit that the doctrine as above outlined should be invoked and applied in the case at bar.

Point III.

THE RESPONDENT HEREIN AS PETITIONER AND APPELLEE BELOW HAS ALLEGED AND PROVED TO THE SATISFACTION OF ALL OF THE COURTS BELOW BOTH ON HEARING AND REHEARING THAT THIS IS A SUIT TIMELY BROUGHT UPON THE REJECTION OF A PROPER CLAIM FOR REFUND OF THE $34,555.68 AS A 1917 TAX.

When the respondent filed its original petition, it alleged that it was seeking to recover the $34,555.68 either as a 1917 tax or as a 1918 tax because of the uncertainty which then existed as to the real status of that sum. However, the respondent, as petitioner and appellee below, has throughout all of the hearings and in all of the Courts relied upon its right to recover the $34,555.68 as an overpayment or wrongful collection of the "1917 tax", which the Commissioner of Internal Revenue has refused to refund, and has considered the allegations of the petition with respect to taxes for the year 1918 as purely precautionary.

In the first opinion of the District Court (R. Vol. I, p. 40) Judge Brewster found and ruled as follows:

"In its petition and amended petition the petitioner

seeks to recover (a) the balance of an overpayment of 1917 income and profits tax, and (b) an additional sum claimed to be due for interest."

In the first opinion of the Circuit Court of Appeals (R. Vol. II, p. 4) Judge Morton said:

> "This is an action to recover $34,555.68 with interest, constituting part of an admitted over-payment by the plaintiff on its income taxes for 1917."

In the second opinion of the District Court (R. Vol. II, p. 16) Judge Sweeney found and ruled as follows:

> "This is an action at law to recover $34,555.68, with interest, constituting a part of an admitted over-payment by the plaintiff on its income taxes for 1917."

In the second opinion of the Circuit Court of Appeals (R. Vol. II, p. 65) Judge Wilson said:

> "This is an action by a taxpayer to recover the sum of $34,555.68 with interest as a part of an overpayment of $91,570.34 for income and excess profits taxes for the year 1917, which overpayment had been allowed by the Commissioner.
>
> . . . . . .
>
> ". . . we think in the last analysis it is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax."

In the third opinion of the Circuit Court of Appeals (R. Vol. II, pp. 77, 78) Judge Wilson said:

> "The government having admitted all the jurisdictional facts except those authorizing the District Court to hear such a case, the facts appearing in the record demonstrate that the suit was one which could have been

brought against a Collector, if living, but who is now dead or out of office.

. . . . . .

"Upon a reconsideration of the facts and the briefs on rehearing, we think this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly applying it to an invalid assessment of a deficiency tax for 1918."

The facts upon which the foregoing findings or rulings of all of the Courts below are based, briefly stated are as follows:

The defendant's answer clearly admits the timely filing of proper claims for refund whether the $34,555.68 be considered as a 1917 tax or as a 1918 tax. Throughout all of the arguments, however, and up to the time of the second hearing, in the Circuit Court of Appeals, all of the parties had considered the case from the viewpoint of the plaintiff's right to recover that sum as a 1917 tax.

It is thus clear that the rejection of this claim for 1917 on February 28, 1928, constituted the rejection of that part of the first claim to which this suit or proceeding relates and falls squarely within the language of *Section* 3226 *of the United States Revised Statutes* which provides as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, . . . No such suit or proceeding shall be begun . . . after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two

> years after the disallowance of the part of such claim to which such suit or proceeding relates. . . ."

The Circuit Court of Appeals on this point (R. Vol. II, pp. 77, 78) said:

> "We think the contention of the taxpayer must be sustained, viz: that the filing of the second claim for refund on November 28, 1927, and its consideration on its merits was a reopening of the original claim of refund which had been timely filed under Sec. 3226 R. S. (amended by Sec. 1113 of the 1926 Revenue Act); *Jones* v. *United States, supra,* page 152; *Southwestern Oil & Gas Company* v. *United States, supra,* page 406; that the Commissioner accepted the claim as such without any objection as to its timeliness or form and considered it on its merits and officially denied it on February 28, 1928, and the suit of the taxpayer was filed within two years, or on September 19, 1929. . . ."

It is respectfully submitted, therefore, that all of the grounds upon which the government bases its jurisdictional objection are untenable since the petitioner has alleged and proved to the satisfaction of all of the Courts below both on hearing and on rehearing that this is a suit timely brought upon the rejection of a proper claim for refund of the $34,555.68 as a 1917 tax which is the same kind of a suit which could have been brought against the Collector of Internal Revenue if he had been in office at the time the suit was commenced.

Point IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY OF THE DECISIONS OF THIS COURT OR THOSE OF ANY OTHER CIRCUIT COURT OF APPEALS AND THE CASES RELIED UPON BY THE GOVERNMENT ARE CLEARLY INAPPLICABLE.

When the Government first raised the question of jurisdiction in its argument in the Circuit Court of Appeals, it relied chiefly upon the case of *Moses* v. *United States*, 60 F. (2) 791 (C. C. A. (2)); certiorari denied 299 U. S. 743, which was a suit on an allowed claim. As to this case it is respectfully submitted that the findings and holdings of all of the Courts, as has been stated above, clearly show that the Moses case is not applicable to the situation presented in the case at bar. In its opinion (R. Vol. II, p. 76) the Circuit Court of Appeals said:

> "It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. *Goodrich, Admr.* v. *Coffin*, 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917 and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918."

The case of *Lowe Brothers Company, supra*, which was forcefully argued and relied upon by the Government at the rehearing was clearly distinguished from the case at bar by the Circuit Court of Appeals (R. Vol. II, p. 78) when it said:

"The case of *Lowe Bros.* v. *United States*, 92 F. (2d) 905 affirmed by the Supreme Court on May 16, 1938, does not militate against the taxpayer's right of recover in this case, since the tax for the year in question in that case was not collected by a collector who was dead or out of office, as the 1917 tax had been in this case, but was in effect collected by the Commissioner of Internal Revenue by applying an overpayment as a credit on taxes for a prior year, which the Commissioner attempted to do in this case for an alleged deficiency tax for 1918."

The case of *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551, 48 S. Ct. 587 was not relied upon by the Government in either of the hearings before the Circuit Court of Appeals on the jurisdictional question. In the petition for certiorari, however, that seems to be the case upon which the Government most strongly relies. That case is clearly distinguishable from the case at bar in three outstanding respects.

First: In that case the taxpayer based its right to sue in the Court of Claims *upon the Commissioner's refusal to grant special assessment.* In the case at bar the Commissioner did not refuse to grant special assessment but he refused to refund a portion of the amount allowable either on the application or on a proper claim for refund which was equal to the amount which he found was also allowable by way of special assessment under *Section* 210 *of the Act of October* 3, 1917.

Second: In that case it does not appear that the taxpayer filed any claim for refund whatsoever which would bring the suit within the requirements of *Section* 3226 *of the United States Revised Statutes.*

Third: Even if the question of special assessment had

any bearing on the case it is clear that here special assessment was allowed and the Commissioner of Internal Revenue refused to pay over or refund the amount of overpayment thus determined while in the *Williamsport Wire Rope Company case, supra,* the Commissioner refused even to allow special assessment.

The cases of *United States* v. *Garbutt Oil Company,* 302 U.S. 528 and *United States* v. *Andrews,* 302 U.S. 517 were not cited in the briefs or relied upon in any of the arguments urged in the Circuit Court of Appeals. But, in the petition for the writ of certiorari (p. 8) the government makes the following statement:

> "Nor can the respondent sustain jurisdiction if the so-called renewal claim were based upon different grounds than those specified in the original claim. Apart from the wholly hypothetical basis upon which such a claim of jurisdiction is founded, it is plain that a renewal claim upon different grounds would be ineffective. In *United States* v. *Garbutt Oil Co.,* 302 U.S. 528, and *United States* v. *Andrews,* 302 U.S. 517, this Court held that claims for refund based upon specific grounds may not properly be amended after the running of the statute of limitations to include new and different grounds. Nor is the result changed where the Commissioner passes on the amended claim on the merits, since he has no power to waive the statute of limitations. *United States* v. *Garbutt Oil Co., supra,* at page 534.

There is nothing in the record to sustain the foregoing statement of the Government. Neither of the claims was put in evidence because the Government expressly admitted by its answer that proper and timely claims for refund had been filed. The question of the grounds upon which a claim for refund is based is a question of fact and the best evidence

of that fact is the document themselves. It is clear, however, from this record, as has been stated above, that the Commissioner of Internal Revenue regarded the claims for refund as timely and proper and considered them on their merits. Under these circumstances it is clear that the government is again precluded under the doctrine of equitable estoppel.

CONCLUSION.

The decision of the Circuit Court of Appeals is not in conflict with any decision of this Court or with those of any other Circuit Court of Appeals. The case does not involve any questions of great public interest and concern which have not already been settled by the decisions of this Court. The United States has not been prejudiced in any manner by reason of the fact that the respondent's claim has been heard and determined in the District Court instead of in the Court of Claims. The whole case has been carefully considered in two decisions of the District Court and in three decisions of the United States Circuit Court of Appeals. The original petition contained all of the necessary jurisdictional averments which were specifically admitted by the government's answer. Throughout the entire presentation of its case in the District Court the respondent, as petitioner below, relied upon those admissions in good faith. Even though the government's objecton is asserted to be jurisdictional in its nature it is based entirely upon facts which could have been alleged and proved or disproved. The Government itself concedes that the respondent was entitled to judgment on the real merits of the case. Under these circumstances it would work a great and unconscionable injustice upon the respondent if the government at this late date should be permitted to repudiate and disregard its own admissions.

Wherefore the respondent respectfully submits to this Honorable Court (1) that the District Court did have juris-

diction of the case (2) that the Circuit Court of Appeals did not err in refusing to dismiss the petition and (3) that the petition for a writ of certiorari should be denied by this Honorable Court.

Respectfully submitted,

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